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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 27

QUEST-SHON MARK BRASSIERE CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ROBERT T. MURPHY,
Counsel for Petitioner.

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Petitioner, Quest-Shon Mark Brassiere Co., Inc., a New York corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which compels the enforcement of an order of the National Labor Relations Board requiring Petitioner to cease and desist from certain alleged unfair labor practices more particularly described in its decree (R. 58-61) and to offer immediate and full reinstatement to twenty employees allegedly discriminatorily discharged and, further, to make whole for any loss of wages allegedly due to Petitioner's discrimination, some twenty-two employees (R. 59).

Opinion Below

The opinion of the Court of Appeals (R. 51-57) is reported at 185 F. 2d 285.

Jurisdiction

The Court of Appeals entered a decree enforcing an order of the National Labor Relations Board on December 12, 1950 (R. 58-61). The time for filing a petition for certiorari herein was extended upon application of the Petitioner, to April 12, 1951. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether conceded fraud in the execution of affidavits of employees allegedly discharged, which were employed by the Board in issuing the complaint and some of which were admitted in evidence, vitiates the entire proceedings before the Board.

2. Whether the refusal of the trial examiner to halt the hearings commenced under the Wagner Act and continued under the provisions of the Taft-Hartley Act was prejudicial to the rights of the Petitioner.

3. Whether the quashing or revocation by the trial examiner of subpoenas required to be issued under provisions of the Taft-Hartley Act calling for production of all pre-trial statements of employees listed in the Board's complaint was prejudicial to Petitioner's rights.

4. Whether conceded offers of reinstatement to work at another plant of the Petitioner, on 84th Street in Brooklyn, New York, fulfilled Petitioner's obligation to employees allegedly discharged from jobs at its plant on 39th Street in the same city.

Statement of Facts

Quest-Shon Mark Brassiere Co., Inc., formerly Brooklyn Corset Co., Inc., a manufacturer of brassieres and related products, operates four plants in Brooklyn, New York

(R. 14). Involved in this case is an order of the National Labor Relations Board (R. 8-11), hereinafter referred to as the Board, affirmed by the Court of Appeals below which is confined to circumstances relating to but one of the four plants, hereinafter designated as the 39th Street plant.

On June 27, 1947, the Corset & Brassiere Workers of New York, Local 32, I.L.G.W.U., A.F.L., subsequently designated as the Union, filed charges with the Board alleging that the Petitioner had committed unfair labor practices by attempting to prevent unionization of several of its plants (R. 11-13).

The genesis of the alleged Union labor strife, on which the charges were founded, originates in incidents occurring at the 39th Street plant on January 22, 1947, and on the subsequent day, January 23, 1947. Allegations by the Union of unfair labor practices purportedly engaged in by Petitioner at its 86th Street plant were entirely removed from the purview of the proceedings in the court below by virtue of the Board's findings in favor of the Petitioner which overruled, in large part, the findings and recommendation of the trial examiner who had upheld Union charges with respect to that plant.

With reference to the 39th Street plant, therefore, the Union charged that Petitioner illegally discharged 8 of its employees on January 22, 1947, and 33 employees on January 23, 1947. The order of the Board, however, sustained findings of unlawful discharge with respect to but 22 of the 41 employees designated in the complaint of the Union. *January 22, 1947*—Emelio Paolillo, Superintendent of the 39th Street plant, called an employee, De James, into his office near the luncheon recess and inquired as to the source of her dejected appearance and uphappy attitude (R. 101-102). De James stated that she wanted a pay raise, a matter discussed on previous occasions, and was told that when a

shipping department was opened at the plant, Paolillo would transfer her from machine work to that department and would endeavor to work out an increase in pay for her. Coming from his office she met several fellow workers with whom she customarily ate lunch at the plant and one of them, knowing of her desire for a pay increase, inquired as to the success of her most recent conversation. De James stated that she got the "same old baloney", whereupon one of the girls remarked that what the plant needed was a Union. Thereupon ensued a discussion among De James and several of her luncheon companions about the feasibility of taking active steps toward interesting fellow workers in a Union and it was agreed that plain slips of paper would be passed among the employees that afternoon for the purpose of ascertaining those interested in such a purpose (R. 101-105).

The slips were circulated surreptitiously so as to keep the matter from coming to the attention of management (R. 81, 108). Some employees understood that signatures evidenced a desire for increased pay and holidays (R. 129); others understood them to signify a desire to join a Union (R. 105, 106).

During the course of the afternoon, Superintendent Paolillo noticed Nardella, a machine worker, passing a cigarette to another employee and requested that she refrain from such conduct during working hours, whereupon Nardella signified her dissatisfaction by screaming and loud remarks (R. 108-109). About an hour before closing time, Nardella was called to Paolillo's office and discharged for lack of production (R. 133). At the close of the day, 7 other employees were discharged for the same reason (R. 94, 116, 133).

January 23, 1947—On the morning of the subsequent day, the discharge of these 8 employees led to a refusal on the

part of a number of machine workers to take their positions at their posts until an explanation of management's action was given to them by Paolillo, or his two brothers, Anthony, Vice-President of the company, and Andrew, President of the company, all of whom were present at the 39th Street plant (R. 106). A number of employees, all females, gathered in the dressing room where conversations with the Paolillo brothers ensued (R. 106). Agitation and excitement prevailed leading to confusion in statements of witnesses who were present as to the precise gist of the acrimonious discussion (R. 106, 118-119, 127-128, 133, 147, 150-156).

Witnesses favorable to the Union asserted that Anthony Paolillo told employees that if they wanted a Union they could get out (R. 106-107, 119); other Union adherents attributed such a statement to either Andrew or Emelio Paolillo (R. 119).

To bring order out of the chaos thus prevailing, Anthony Paolillo made a statement over the loud speaker system in the plant requesting that all employees who wanted to work should take their places at their machines promptly and that those who did not desire to work should vacate the premises (R. 118, 134, 147, 150). Some of the Board witnesses, however, asserted that Paolillo also made the statement, at this time, that if any of the girls wanted a Union they should get out of the plant immediately (R. 107-108, 119).

The end result, in any case, was the walkout of 32 employees that morning (R. 3, 28, 77). These were joined by the 8 employees discharged on January 22 and a conference was held in the back room of a bar and grill directly across the street from the plant where it was agreed that the Union would be contacted. On the afternoon of the same day, a Union representative, Miss Bushell, joined these

employees at their meeting place, advised them of purported rights under the Wagner Act, and procured signatures on Union authorization cards (R. 119-121).

Under Union direction picket lines were thereafter formed at all of Petitioner's plants and persisted until May, 1947. During the course of the picketing there were public outbursts of violence resulting in the arrest of several picketers (R. 68, 124-125). Profane and slanderous remarks were hurled by the picketers and acrimonious feeling was engendered between the picketers and the majority of Petitioner's employees who remained at their work in the 39th Street plant (R. 129-130). Offers made by Petitioner to conduct an open election in all of its plants and to abide by majority vote of its employees were made on several occasions without any response or acceptance by the Union (R. 78, 124-126). Many of the picketers voluntarily sought reinstatement in the employ of Petitioner during the Spring and Summer of 1947 and were reemployed without undue discrimination. Because of the deep feelings resulting from activities of the picketers, Petitioner offered reemployment to all the strikers at their former jobs in the 39th Street plant on condition that they were acceptable to their former co-workers and set up a new plant on 84th Street in Brooklyn where those who were not so acceptable were reemployed (R. 7, 130-132).

Hearings before a trial examiner of the Board were commenced on August 18, 1947, and continued on various dates until September 18, 1947. The trial examiner issued a report, on December 31, 1947, finding that the Petitioner had discriminatorily discharged 40 employees at the 39th Street plant and 19 employees at the 86th Street plant and recommended an order requiring the reinstatement and other penalties for a total of 59 employees (R. 11-45). The Board, however, in its order issued on December 7, 1948, limited the

findings of discriminatory discharge to 22 employees at the 39th Street plant alone and all charges with respect to purported illegal activity of Petitioner elsewhere were removed from the case (R. 1-11).

On petition by the Board for enforcement of its order, the Court of Appeals below affirmed the findings and order of the Board in its entirety (R. 51-57).

Specifications of Error to Be Urged

The Court of Appeals erred:

1. In condoning the use of affidavits fraudulently notarized, through the aegis of the Union by holding that such were admissible in evidence, as signed statements, for the purpose of discrediting and impeaching the testimony of witnesses whose oral testimony in favor of Petitioner contradicted such written statements.

2. In holding that the request of Petitioner for a cessation of the hearings, commenced four days before the effective date of the Taft-Hartley Act, which was made to the trial examiner on August 22, 1947, the effective date of the Act, was properly denied.

3. In holding that the revocation or quashing of subpoenas, on motion of the Board, which called for the production of the written statements in the possession of the Board of all employees listed as complainants in the charges was proper in substance although deficient in form.

4. In holding that the Board did not abuse its discretion in finding that offers of reinstatement made to strikers at the 39th Street plant to return to work at a plant located within 45 blocks thereof, namely, at 84th Street, was not sufficient to fulfill Petitioner's obligation under the Labor-Management Relations Act.

Reasons for Granting the Writ

Fraud in the execution of affidavits by Union representative, which was subsequently admitted in evidence in the hearings, is so gross and shocking as to vitiate the entire proceedings.[1]

It has been conceded by representatives of the Board and acknowledged by the court below that the organizer, Bushell, procured the notarization of written statements of employees, allegedly discriminatorily discharged, in a highly improper fashion. This fact was brought to the attention of both the trial examiner and counsel for the Board on the very first day of the hearing (R. 66-67). Ogno, a Board witness, whose testimony was favorable to the Petitioner, was confronted, by Board counsel, with a statement purportedly given under oath. While admitting that she had signed the statement, she denied that she had ever sworn to its contents (R. 63). The exact same situation was repeated in the instance of the second Board witness, Josephine Guardino, and a similar affidavit was offered by the Board and admitted in evidence (R. 73).

After several days of hearing during which time other employees, called as Board witnesses, disavowed the affidavits on the ground that they had never sworn to them, the Board counsel finally stated to the trial examiner the following:

> "Mr. Examiner: At this time I would like to state with respect to certain affidavits that are in evidence

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[1] The court below has stated that in its view the Board's case was a relatively strong case which remitted Petitioner to the position of an attack on procedural points. However, what the court below failed to point out was that the Board had dismissed charges sustained by the trial examiner with respect to 37 employees—more than 60% of those purportedly discriminatorily discharged. This is not only evidence of the prejudicial attitude of the trial examiner but also materially weakens the presumption indulged in by the court that the case is a strong one with reference to the remaining 22 employees covered in the enforcement order.

> here which, on their face purport to be sworn to before a notary public named Julius Cohen that I have ascertained that the affidavits were not actually sworn to before that notary. I would like to say that the Board did not know about that until it developed in the testimony in this hearing." (R. 123-124.)

The Union representative, Bushell, admitted her responsibility for this situation (R. 145-147). Although confronted by this shocking situation neither the trial examiner nor the representatives of the Board expressed any concern whatever for the fraudulent tactics of the Union thus evidenced. Fraudulently executed affidavits were permitted to go into the record of the hearing and their use is seemingly justified on the theory that such were not relied upon for direct evidence but employed only for purposes of impeaching the credibility of those witnesses who testified in variance with them. The net result, of course, was that such testimony favorable to Petitioner and given under oath at the hearing, where cross-examination was possible, was disregarded by the Board. Substantially this removed from the consideration of the Board all evidence of employees except that in support of the Union charges.

In these circumstances, the Court of Appeals was called upon to reverse the Board's findings not only on the ground that the fraud in the execution of such affidavits was such as to vitiate the entire proceedings but also on the ground that the use of the affidavits wrought a substantial injustice to Petitioner.

In passing upon this contention, the court below observed in a strikingly mild fashion that:

> "Whatever the impropriety of the acts of the notary and the assistant Union representatives, the statements remain statements unsworn or sworn which were usable to discredit the witnesses in case of conflict with their subsequent testimony at the hearing. The real issue is

whether they were used improperly at the hearing as respondent next asserts." (R. 54-55.)

Petitioner contends that the court below has, in effect, condoned a radical departure from norms of judicial administration which the Board had ratified. Basic standards of administration of justice alone call for castigation of such tactics rather than a polite evaluation of their possible prejudicial effect, in which the Court of Appeals has indulged. Petitioner suggests that in a situation such as this, a litigant ought not to be called upon to carry the burden of demonstrating the harm resulting from a fraud plainly perpetrated for the purpose of assuring a Union victory. It is as much the duty of the Board to protect the interests of the employer as the Union and that salutary purpose can be achieved if the attention of the Board is occasionally called to this fact which, at times, has been forgotten.

The Court of Appeals, however, indulging in legal niceties, ostensibly endeavored to consider the possible adverse effect upon the rights of the Petitioner by choosing to regard the fraudulently notarized statements as "prior self contradictions", which, in its view, were properly considered and employed by the Board for the sole purpose of discrediting those witnesses against whom the statement was used. In this connection, the court below observed:

> "Technically, therefore, the statements should have been carefully restricted on the face of the record to their purpose to discredit. We do not think a reversal here required, however, for the trial examiner states explicitly in his report that his findings are not rested on the evidence from the discredited witnesses, but on other proof not so impugned. Because of this fact, and because, too, as it appears, the Board carefully examined the record as well for points just such as these, its decision should not be overturned because counsel did not follow the traditional procedure pre-

cisely and did not first declare his own witness hostile and then produce the statements as discrediting matter. *A reversal to reach the same result later will serve little purpose"* (R. 55). (Emphasis supplied.)

What the Court of Appeals fails to consider, however, is that while the statements may not have been employed affirmatively for evidentiary purposes, they were used negatively for the purpose of removing from the purview of the Board much evidence favorable to the employer. This is particularly significant in the light of the testimony of some of the witnesses, against whom the statements were used for purposes of impeachment, that they were urged by the Union organizer to exaggerate their statements and that they contained facts which they would never affirm under oath (R. 87, 148-150). Moreover, the court fails to consider the value of such statements to the Union as a whip or a lever of control over the testimony of witnesses called by the Board to support its charges. Although never introduced, such statements in the possession of the Board counsel were psychologically effective.

Apart from the demonstrable prejudice flowing from the use of such fraudulent affidavits, even as "prior self contradictions", the plain fact is that the error is not "harmless error", as the court below seems to believe. Rather it is so flagrant a fraud as to dispel the validity of the entire proceedings and to call for the exercise of the supervisory powers of this Honorable Court.

Further consideration ought to be given to the fact that all pretrial statements of disgruntled employees were in the nature of self-serving declarations which are generally not admissible in evidence, under the Federal Rules of Civil Procedure; or if received, to be treated with great caution. The record discloses that these statements were given under circumstances of deep anti-employer feeling and during a

period of labor strife when Union organizers had advised that if discriminatory discharges could be established, employees would not only be reinstated to their former jobs, but would also secure back pay.

Here notarization was improperly procured by the Union organizer for the plain purpose of giving such unsworn and self-serving declarations that greater weight and dignity which the law accords statements made under oath. In a day when public mores requires cessation of the chipping away process which seems to be persistently growing with reference to the dignity of oaths, certainly more is required than a justification of such scandalous conduct on the ground of legal nicety. The holding of the court below, if undisturbed, will only serve to give additional weight to the charge, not infrequently made, that shocking injustices result from Board rulings. *Wilson & Co.* v. *National Labor Relations Board,* 126 F. 114; *Wyman-Gordon Co.* v. *National Labor Relations Board,* 153 F. 2d 480; *National Labor Relations Board* v. *Columbia Products Corp.,* 141 F. 2d 687; *National Labor Relations Board* v. *Union Pacific Stages, Inc.,* 98 F. 2d 153; and cases cited therein.

2. The refusal of the trial examiner to terminate the hearings commenced under the Wagner Act on the effective date of the Taft-Hartley Act was prejudicial to the rights of the Petitioner.

On the effective date of the Taft-Hartley Act, August 22, 1947, counsel for Petitioner invited the attention of the trial examiner to the significance of the taking effect of the new law which had long been heralded by debate in Congress and discussion throughout the nation and a request was made that the proceedings be halted (R. 109-111). This request was refused and the hearings continued (R. 111). Among other changes sought to be accomplished by the Taft-Hartley Act was the conformity of procedures before

the Board to those rules of procedure which govern the trial of cases in the District Courts of the United States. Prior thereto, dissatisfaction with the tactics of the Board in the conduct of its hearings wherein hearsay evidence was the rule rather than the exception, constituted one of the salient reasons for the Congressional amendment. It can scarcely be contended that either the examiner or the Board counsel was familiar with the new procedures which the Taft-Hartley Act contemplated and had that degree of experience with the new Act which would have safeguarded the interests of Petitioner, as an employer, which the new Act was intended to make certain. It is not without significance that the Board ordered the hearings to commence on August 18, 1947, just four days before the effective date of the new Act, with full knowledge of the possible change in the "rules of the game" which would occur in the very midst of such hearings. The prejudice to the Petitioner is obvious when it is noted that the trial examiner subsequently made a completely erroneous ruling on the issuance of subpoenas which were not available to Petitioner under the Wagner Act but which the Taft-Hartley Act made mandatory. Since this is treated under a separate heading in the Petition, there is no need to fully discuss it here except to observe that the non-experience of the Board representatives with procedures under the new Act resulted in this very prejudicial error.

It is clearly evident, therefore, that the Court of Appeals has erred in its holding that the amendatory Act did not require the discontinuance of the hearing in the light of the circumstances which here prevail.

3. The revocation by the trial examiner of a subpoena requiring the production of all pre-trial statements of the employees listed in the Board's complaint was prejudicial to Petitioner's case.

Early in the hearing, Petitioner requested the issuance of a subpoena calling for the production of all pre-trial statements, including affidavits, of those employees listed in the Union's complaint. This was denied under the authority of the Wagner Act and the rules and regulations of the Board then obtaining (R. 92-93). The trial examiner, however, noted that under the new rules effective August 22, 1947, namely, under the Taft-Hartley Act, the issuance of such a subpoena was mandatory and further observed that such application could be renewed thereafter (R. 92-93).

Accordingly, Petitioner renewed the application for such subpoena on August 22, 1947 (R. 111), and the subpoena was issued by the trial examiner and served upon the Board (R. 112). Counsel for the Board, however, moved to quash the subpoena and after hearing on argument the trial examiner granted the motion of the Board on the ground that Petitioner's request was in the nature of "exploration" and was in effect a "fishing expedition" (R. 143). The Court of Appeals affirmed the ruling of the trial examiner although admitting that the basis of his revocation of the subpoena was incorrect. In effect the court below has held that Petitioner failed to demonstrate the purpose for which the evidence was to be used and further failed to show how it was injured by the denial of the subpoena. The keystone of the holding by the court below is plainly the Federal Rules of Civil Procedure. In its opinion the court stated in pertinent part:

> "True, the new act did contemplate a broad grant of the subpoena privilege; but the touchstone is that of the district court rules of evidence under the Federal Rules of Civil Procedure, 29 U. S. C. A. § 160(b), quoted supra. Not only do we not see any harm to respondent in the action taken; we also fail to see how the giving of this evidence could have been compelled in district court practice. These were papers developed by the Board's investigator in preparing for the hearing or trial. It

> is now settled that while there is no absolute privilege for statements of witnesses to counsel in preparation for trial, yet they cannot be obtained as of course; the usual statement appears to be that some necessity for their production must be shown, and death or unavailability of the witnesses are cited. Cleary Bros. v. Christie Scow Corp., 2 Cir., 176 F. 2d 370, 372, following Hickman v. Taylor, 329 U. S. 495, 507, 67 S. Ct. 385, 91 L. Ed. 451. Even if a less strict rule should eventually develop, there was here no attempt to show any need whatsoever. Had there been, doubtless it would have run into the difficulty discussed above that at most the testimony, rather than the statements, of the witnesses was alone of benefit to respondent." (R. 56.)

Petitioner directly challenges the correctness of the assertion by the Court of Appeals that the ruling of the trial examiner was ". . . so right in substance there seems little reason to suggest objections to its form." The court below has totally ignored the provisions of both the Taft-Hartley Act and the rules and regulations of the Board which govern here and has instead turned to the Federal Rules of Civil Procedure which are not applicable because of the direct provisions of the governing statute and regulations.

The Labor Management Relations Act makes the issuance of a subpoena mandatory and provides for its revocation by the Board only ". . . if in its opinion the evidence whose production is required does not relate to any matter under investigation or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required." (Section 11(1).)

The Regulations of the Board itself repeat almost *in haec verba* the language of the statute: "The trial examiner or the Board, as the case may be, shall revoke the subpoena if in its opinion the evidence whose production is required

does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required." Section 203.31(b) R. & R. of NLRB.

The only lawful basis, therefore, for revoking the subpoena in the light of the applicable law governing the conduct of the trial examiner was a finding by him that the documents either (1) did not relate to any matter in question in the proceedings or (2) that the subpoena did not describe with sufficient particularity the documents requested. The record fails to disclose that the trial examiner advanced either finding as the reason for his ruling. Indeed, the record amply indicates that no such finding could have been made. Petitioner, therefore, was clearly entitled to have had the documents produced and turned over to it for examination.

As noted, *supra,* the court below has curiously ignored the basic law governing the revocation of the subpoena and has turned to the Federal Rules of Civil Procedure on the theory that they are the "touchstone" of the situation. Neither the *Hickman* case nor the *Cleary Bros.* case cited by the court as controlling is apropos of the instant situation, even assuming, *arguendo,* that the Rules of Civil Procedure govern rather than the basic statute and regulation. It is now well settled that the rules governing discovery of evidence in federal litigation should be liberally rather than narrowly construed. 2 Barron & Holtzoff, Federal Practice & Procedure, Section 792 and cases cited therein. While both the *Hickman* and *Cleary* case may well lay down the principle that there must be a sufficient showing of necessity to require attorneys to disclose to their adversary the contents of their private files, there is nothing in either the Taft-Hartley Act nor the regulations of the Board which required Petitioner to make any such showing to the satisfaction of

the trial examiner. It suffices that the documents were relative to the hearing and were sufficiently described to identify them. Unlike the situation in the cases cited by the court below the documents were not the personal property of the trial examiner; at best they were documents in the custody of an agency of the United States which had been obtained by the Union, a party to the litigation, and strangely enough under the rules provided by the agency itself, were subject to subpoena and production upon the showing of their relevancy and their sufficient identification.

Prejudice in such a situation may be presumed. But apart from this fact, the revocation of the subpoena seriously jeopardized Petitioner's rights in demonstrating that a pattern of identity, the use of identical language and evidence of exaggeration ran throughout the statements submitted by the Union in support of its contention to the Board. Reference alone to the two pre-trial statements appearing in the record as Board's exhibits 44 and 45 is enough to indicate that a number of girls were copying one another's statements (R. 157-158). Moreover, Petitioner was limited on the extent of cross examination of Board witnesses, whose pre-trial statements were not offered in evidence by the Board but which by the very fact of their being in possession of the Board served to act as a lever or whip by which their testimony was controlled. In addition, the preparation of Petitioner's case was hampered by the inability to examine the written statements upon which the complaint and charges had issued.

As a District Court recently observed, the time honored cry of "fishing expedition" is no defense to a motion for the discovery and production of documents. *Hirshhon* v. *Mine Safety Appliances Co.*, D.C. Pa. 1948, 8 F.R.D. 11. And while the court below agrees that the ruling was erroneous in form its holding that it was correct in substance

is so patently erroneous and prejudicial as to warrant reversal.

4. The Court of Appeals has erred in holding that the Board properly refused offers of reinstatement to a plant other than that at which striking employees were formerly employed.

The offers of reinstatement have been conceded. Originally the trial examiner went so far in his report as to find that the offers were not such as contemplated by the Act on the finding that they were conditioned upon abandonment by the employees of their desire to join a Union (R. 39). This wholly untenable position of the trial examiner was reversed by the Board which has pitched its finding on a different ground, namely, that the strikers were offered reemployment only on condition that they were acceptable to their former co-workers at the 39th Street plant; and if not so acceptable they were to be reemployed at the 84th Street plant (R. 7). The Board observed: "This is not an unconditional offer of reinstatement such as is contemplated by the Act." (R. 7). The Court of Appeals refused to disturb the finding of the Board in this regard on the ground that: "We are not in as good a position as the Board to evaluate the conflicting consideration thus presented; in any event the Board had a discretion as to the remedy to be proposed with which we are not at liberty to interfere. *Phelps-Dodge Corp.* v. *NLRB,* 313 U.S. 177, 194, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217." (R. 57.)

The Board's finding on this head was plainly arbitrary and capricious and should have been set aside by the Court of Appeals. What the court below has done is to abandon its own right to apply its own standards to this situation and has blindly followed the ruling of the Board. As the late Chief Justice Stone cogently observed in *Labor Board* v. *Cheney Lumber Co.,* 327 U.S. 385, 390, the Court of Ap-

peals is not required "to act as a mere ministerial agency to execute the orders of the Board without regard to those standards which control the court's use of its own processes . . ." In supporting the Board's ruling, the court below has in effect held that all offers of reinstatement to which any condition of any character are attached are *per se* invalid. Obviously such a sweeping generality cannot be justified by reliance upon the purported latitude allowed the Board to supply remedies for alleged labor wrongs. Otherwise the Board could well pursue a line of reasoning wherein all offers of reinstatement to which any conceivable condition is attached would be held to be invalid.

Here the alleged condition which destroys the validity of the offers of reemployment, in the view of the court below, is not one which has imposed a harmful burden upon the employees. Indeed, there is no evidence in the record nor did the Board seek to advance any evidence of harm or prejudice to the striking employees reemployed at the 84th Street plant. Not one of the Union witnesses who were so employed there made any complaint whatever as to working conditions or plant facilities or inconvenience. Has the time come when an employer must not only reinstate an employee to exactly the same position with exactly the same rights as previously enjoyed, but also in precisely the same building? It will be noted that the distance between the two plants is simply a matter of some 49 city blocks and quite unlike a situation where a striking employee would be offered reemployment in a distant city.

Behind the action of the Petitioner there stands a basic salutary purpose, namely, the promotion of industrial peace and harmony as envisioned in the Labor Management Act itself. It cannot be disputed that there was acrimony and deep resentment engendered by the actions of the picketers toward the majority of employees who remained at work in

the 39th Street plant. Further labor strife would be engendered by attempting to house these divided camps under one roof in the absence of mutual understanding and agreement between them. The interests of both employer and employee were thus at stake. It can scarcely be said that the simple change in circumstances of working on 84th Street in Brooklyn instead of on 39th Street in Brooklyn is such a prejudicial hardship upon employees that Petitioner should be penalized, as the court below has indicated.

Blind adherence to precise principles which might apply in cases of other and dissimilar facts ought not to be relied upon by the Court of Appeals for the purpose of upholding a clearly capricious order of the Board. It is submitted that this court should exercise its own supervisory powers so that the golden calf of precedent not supplant the basic intent of the legislative policy of the Congress as evidenced in the Labor Management Relations Act.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 12, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 27

QUEST-SHON MARK BRASSIERE CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 51-57) is reported at 185 F. 2d 285. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1-9) are reported at 89 NLRB 1149.

JURISDICTION

The decree of the court below was entered on December 12, 1950 (R. 58). By order of Mr. Justice Jackson, dated February 20, 1951, the time

for filing a petition for a writ of certiorari was extended to and including April 12, 1951 (R. 62). The petition for a writ of certiorari was filed on April 12, 1951. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as originally enacted (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are set forth in the Appendix, *infra,* pp. 15-17.[1]

QUESTIONS PRESENTED

1. During the hearing before the trial examiner, counsel for the Board discovered and announced that signed statements he had used to show prior self-contradictions by witnesses testifying at the hearing had not been sworn to before a notary public though they appeared to have been notarized. The first question presented is whether these facts invalidate the Board's order against petitioner.

2. Whether, on the effective date of the Taft-

[1] The events giving rise to these proceedings occurred before the amendments to the Act. It is, accordingly, undisputed that the substantive rules applicable to petitioner's alleged unfair labor practices were contained in Section 8 (1) and (3) of the original Act. In any event, the provisions relevant to this case are carried forward without material change in Section 8 (a) (1) and (3) of the amended Act.

Hartley Act, the Board was required to terminate and recommence a hearing in progress.

3. Whether petitioner was entitled as of right to discovery of statements in the Board's files obtained during the course of investigating charges against petitioner.

4. Whether petitioner, by offering reinstatement to its unlawfully discharged employees at a plant other than the one in which they had been working, terminated its liability for the wrongful discharges.

STATEMENT

A. *The findings and decision on the merits.*— Upon the usual proceedings under Section 10 of the National Labor Relations Act,[2] the Board, on December 7, 1948, issued its findings of fact, conclusions of law, and order. The Board's findings, which are not in dispute here, show that petitioner sought to combat union organization of its employees by rewards and promises, by interrogation, by threatening to move its plants if the employees organized, and by ordering those of its employees who wanted a union to leave its employ (R. 1-2). By these practices, the Board held, petitioner had violated Section 8 (1) of the Act (Appendix, *infra,* p. 15). The Board also found

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[2] The proceedings were begun under the original Act of July 5, 1935 (c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*), and concluded after the effective date of the amendments made by the Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*).

that petitioner had discharged 22 of its employees for union activities, thus violating Section 8 (3) of the Act (Appendix, *infra*, p. 15) (R. 2-6).

In holding that these discharges constituted unfair labor practices, the Board noted that petitioner had offered to rehire the discharged employees. The jobs so offered, however, were to be at the plant (39th Street) from which the employees had been dismissed *"only on condition that they were acceptable to their former co-workers"* at that plant; otherwise—and petitioner's counsel testified that the discharged employees would probably be unacceptable to those who kept their jobs (R. 130-131)—the reemployment was to be at another of petitioner's plants, on 84th Street.[3] The Board concluded that these were not such unconditional offers of reinstatement as to terminate petitioner's liability under the Act to remedy the unlawful discharges (R. 7). Accordingly, the Board ordered reinstatement of the wrongfully discharged employees with back pay as well as cessation of the other unfair labor practices disclosed by the record and the posting of appropriate notices (R. 8-9).

In granting enforcement of the Board's order, the court below rejected petitioner's contention that reinstatement for the discharged employees had been improperly required because it had pre-

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[3] Petitioner operates the two plants mentioned and several others, all in Brooklyn, New York (R. 14).

viously offered them reemployment. The Board had acted within the scope of its "discretion as to the remedy to be proposed," the court held, in concluding "that an offer of work at another and distant plant did not fulfill [petitioner's] obligation" (R. 57).

B. *Petitioner's procedural objections.*—The circumstances giving rise to the three procedural questions urged in the petition for certiorari may be summarized as follows:

1. At several points during the hearing before the trial examiner, when employees of petitioner gave testimony contrary to statements they had signed and given to a Board investigator, counsel for the Board introduced the signed statements, which appeared to have been notarized (R. 63, 71-73). As the hearing progressed, it developed that the written statements had not in fact been sworn to, but that a union representative, when asked by a Board employee to have the statements notarized, had merely sent them to a notary public who had affixed his jurat without swearing or seeing the signatories (R. 123, 146). The Board's attorney, upon learning these facts, disclosed them at the hearing, pointing out that the irregularity in the documents had not been known prior to the hearing (R. 123-124).

Noting that the invalidity of the notarizations had been fully disclosed at the hearing before the trial examiner, the court below found no basis for

petitioner's contention that a "fraud" had been perpetrated against the Board which required nullification of its order (R. 54). Nor, the court held, was there any substantial reason for refusing enforcement because the statements had been introduced at the hearing since they had been used, and were properly usable, only as prior inconsistent statements, and had been expressly ruled out out by the trial examiner as affirmative evidence in support of his findings (R. 55).

2. On August 22, 1947, four days after commencement of the hearing before the trial examiner (R. 62), the Taft-Hartley amendments to the National Labor Relations Act became effective. Labor Management Relations Act, 1947, Sec. 104, 61 Stat. 136, 152. On that date, petitioner moved that the hearing be stayed pending proof that the charging union had filed the information and affidavits required by Section 9 (f), (g), and (h) of the amended Act (R. 109-111). Noting that the complaint had issued in this case before the amendments to the Act, the trial examiner denied the motion (R. 110, 111).

Apparently altering its position in the court below, petitioner urged that the hearings should have been discontinued and new proceedings instituted after amendment of the Act. The court below dismissed this contention briefly, pointing out that the amendments were designed to continue, not set aside the Act, and that petitioner could

show no prejudice resulting from the "obviously proper" continuation of the hearing already in progress (R. 54).

3. Relying on Section 11 (1) of the Act as amended, petitioner, on August 22, 1947, the effective date of the amendments, renewed an application which had previously been denied (R. 92-93) for a subpoena requiring the Board to produce all the statements that had been taken by Board investigators from petitioner's employees (R. 111). Persuaded that the amended Act compelled him to grant the application, the trial examiner issued the requested subpoena, directed to the Board's regional director (R. 112). Thereafter, counsel for the Board, arguing that the Board was not required to turn over the papers in its investigatory files, moved that the subpoena be revoked (R. 139-141). The trial examiner concluded that petitioner's demand was merely "in the nature of exploration" and granted the motion (R. 143).

The court below observed that petitioner's attack upon this ruling "is shrouded in some obscurity beyond its reliance on the bare grant of the subpoena privilege in the Taft-Hartley Act * * * since it does not show what its purpose was with the evidence it expected to obtain or how it was injured" (R. 55-56). Referring to the settled rule that statements by witnesses to counsel in preparation for trial need not be produced unless the party seeking them shows some necessity for

their production, the court held that petitioner had no absolute privilege to examine the papers in the Board's files. Since "there was here no attempt to show any need whatsoever," the court concluded, petitioner's objection to the quashing of its subpoena presented no ground for denying enforcement of the Board's order (R. 56-57).

ARGUMENT

1. As the decision by the court below makes clear (R. 54-57), none of the three procedural contentions to which the petition for certiorari is mainly devoted casts doubt on the propriety of the Board's order. Supported neither by authority nor by any concrete showing of prejudice, petitioner's attacks against the Board's proceedings pose no question warranting review by this Court.

(a) It is undisputed that some signed statements employed by Board counsel to show prior self-contradictions appeared physically to have been notarized though they had not actually been sworn to in the presence of a notary public. It is also undisputed, however, that the statements had in fact been signed by the witnesses involved and that the irregularity of the apparent notarizations was fully disclosed at the hearing by Board counsel upon discovery of the defect. It is clear, then, as the court below pointed out (R. 54), that petitioner's charge of "fraud," vigorously reasserted here (Pet. 8-12), is without substance. Had the Board shared petitioner's conviction that a fraud had

been unsuccessfully attempted by the charging union, it might in its discretion have dismissed the complaint. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9, 18-19. However, since the charge "merely sets in motion the machinery of an inquiry" (*ibid.*), the Board was required neither to try the charging union nor to leave unredressed the unfair labor practices in which petitioner had engaged. *Ibid.; National Labor Relations Board* v. *Donnelly Co.,* 330 U. S. 219, 235-236.

Because they had made and signed the statements, the witnesses were properly confronted with them when they gave inconsistent testimony at the hearing. To make such showings of inconsistency it was unnecessary that the prior statements be notarized, or even that they be written. 3 Wigmore, *Evidence* (3d Ed., 1940), p. 727. While the documents could not have been used as evidence of the facts they asserted (*Southern Ry.* v. *Gray,* 241 U.S. 333, 337; 3 Wigmore, *op. cit. supra,* p. 687), their limited use for impeachment, with the trier of fact fully aware that the irrelevant notarizations were defective, gives petitioner no cause for complaint.

(b) Summarily rejected by the court below (R. 54), petitioner's contention (Pet. 7, 12-13) that the hearing should have been terminated and recommenced after the effective date of the Taft-Hartley Act scarcely merits extended discussion. As the Court of Appeals for the Eighth Circuit ob-

served in disposing of a similar argument (*National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 238, certiorari denied, 334 U. S. 845):

> Insofar as Congress amended certain procedural provisions of the Act it reflected no intention to reach back and nullify procedural steps already taken. Those steps already taken, pleadings, and all things done under the old law must stand. Procedural chánges operate in the future.

Petitioner's contrary view, apart from the fact that it is no longer of material importance in the administration of the Act, is without basis.

(c) Equally baseless is the contention (Pet. 13-18) that the Board's order should have been held invalid because petitioner was denied discovery of written statements obtained from its employees during the Board's investigation. Petitioner does not question the correctness of the holding below that such papers may ordinarily be obtained only on a showing of some necessity for their production. *Hickman* v. *Taylor*, 329 U. S. 495. Petitioner urges, however, that this requirement is inapplicable here because Section 11 (1) of the Act provides for the issuance of subpoenas and limits the grounds for their revocation by the Board in the following sentence:

> Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his

> control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required.

From this language, petitioner argues that its subpoena to the Board's Regional Director should not have been revoked and that the revocation was prejudicial.

The insubstantiality of this contention is evident for the reason stated by the court below (R. 55-57). Assuming that the subpoena was properly issued and should not have been formally "revoked," the important point remains that the subpoena was properly resisted by the Board's Regional Director because petitioner was not entitled to the papers it sought. There is no reason for petitioner's apparent assumption that a Board subpoena may be resisted only on the limited grounds prescribed for its revocation by the Board. It seems clear, on the contrary, that in requiring the Board to seek obedience to its subpoenas in the district courts (Section 11 (2) of the Act), Congress left intact the traditional privileges and restrictions limiting compulsory disclosure. Cf. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 512 (Mr. Justice Murphy, dissenting). It is clearer still that Con-

gress could not have intended, by the indirection of conferring the subpoena power, to strip from the Board its essential prerogative of keeping its investigatory files confidential—at least where, as here, there has been "no attempt to show any need whatsoever" for access to such materials (Opinion below, R. 56).[4]

2. Petitioner's one argument on the merits—that the "Court of Appeals has erred in holding that the Board properly refused [to give appropriate recognition to] offers of reinstatement to a plant other than that at which striking employees were formerly employed" (Pet. 18)—is no more substantial than the procedural points already discussed. In vindicating the public interest with which it is charged, the Board is empowered to require correction of unfair labor practices by "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 194. Despite petitioner's light dismissal of "a matter of

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[4] The Board's Rules and Regulations, Series 5, Section 203.90 (now Section 102.90 of Series 6, 16 Fed. Reg. 1934, 1947, effective March 1, 1951) forbid Board officers and employees to "produce or present any files, documents, reports, memoranda, or records of the Board * * *, whether in answer to a subpena, subpena duces tecum or otherwise, without the written consent of the Board or the chairman of the Board, if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel." The necessity for and validity of such regulations were recently reaffirmed by this Court in *Touhy* v. *Ragen,* 340 U. S. 462.

some 49 city blocks" (Pet. 19)—the distance between the plant in which the wrongfully discharged employees had worked and the one in which petitioner offered to reemploy them—this was plainly matter enough to make the offer inadequate, particularly in view of petitioner's own testimony (R. 135) that most of the discharged employees lived in the immediate vicinity of the plant from which they had been dismissed. No longer contesting the finding that its employees were wronged, recognizing that their former place of employment was still in existence, petitioner has no ground for its argument that the employees should have been required to settle for less than a complete remedy.

Nor does the argument acquire substance from petitioner's asserted fear of friction between the returning dischargees and the employees who remained at the plant (Pet. 19-20). The Act leaves the employer free to maintain discipline in his shop; it does not permit the need for discipline to serve as a pretext for destroying the rights it insures. As in the decision below, the courts have consistently rejected claims that the guarantees of the Act must yield where their enforcement may entail disharmony among a company's employees or other economic burdens upon the enterprise. *E.g., National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C. A. 6); *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853-854 (C. A. 8); *National La-*

bor Relations Board v. *John Engelhorn & Sons*, 134 F. 2d 553, 557-558 (C. A. 3); *Warehousemen's Union* v. *National Labor Relations Board*, 121 F. 2d 84, 87 (C. A. D. C.), certiorari denied, 314 U. S. 674.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1951.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> Sec. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, 151 *et seq.*), are as follows:

> * * * * *
>
> SEC. 2. When used in this Act—
>
> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.
>
> * * * * *

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required

from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

* * * * *

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